

## DEPARTMENT OF STATE REVENUE

## LETTER OF FINDINGS NUMBER: 00-0437

Sales and Use Tax  
Tax Administration -- Penalty  
For Years 1997 through 1999

NOTICE: Under Ind. Code 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superceded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

**ISSUES****I. Sales Tax – Imposition of Sales Tax on Exempt Items**

<b><u>Authority:</u></b>	IC 6-2.5-2-1	45 IAC 2.2-1-1
	IC 6-2.5-5-2	45 IAC 2.2-2-1
	IC 6-2.5-8-1	45 IAC 2.2-2-2
	IC 6-2.5-8-8	45 IAC 2.2-5-6
	IC 6-2.5-9-8	45 IAC 2.2-8-12
	IC 6-8.1-3-1	45 IAC 15-3-3
	IC 6-8.1-3-4	

The taxpayer protests the imposition of sales tax on tires sold to farmers.

**II. Sales Tax – Imposition of Sales Tax on Sundries**

<b><u>Authority:</u></b>	IC 6-2.5-2-1	45 IAC 2.2-2-1
	IC 6-2.5-5-2	45 IAC 2.2-2-1
	IC 6-2.5-8-1	45 IAC 2.2-2-2
	IC 6-2.5-8-8	45 IAC 2.2-5-6
	IC 6-2.5-9-8	45 IAC 2.2-8-12

The taxpayer protests the imposition of sales tax on various sundries sold to the public.

**III. Use Tax – Imposition of Use Tax on Rental and Other Items**

<b><u>Authority:</u></b>	IC 6-2.5-3-1	45 IAC 2.2-3-1
	IC 6-2.5-3-2	45 IAC 2.2-3-4
	IC 6-2.5-3-4	45 IAC 2.2-3-19
	IC 6-2.5-3-5	45 IAC 2.2-3-24

**IC 6-2.5-4-10(a)**

**45 IAC 2.2-3-27**

The taxpayer protests the imposition of use tax on uniforms and towels rented from a laundry service, and on various sundries used on site.

**IV. Tax Administration – Penalty**

**Authority:** IC 6-8.1-10-2.1  
IC 6-8.1-5-4

**45 IAC 15-11-2(b)**

The taxpayer protests the imposition of the 10% negligence penalty.

**STATEMENT OF FACTS**

Taxpayer, an Indiana retail merchant, is the sole proprietor of a business specializing in selling and repairing tires. The majority of taxpayer's customer base consists of local farmers. Taxpayer also sells various sundries—soda, cigarettes, magazines and bagged snack items—to the public. Taxpayer purchases other items, such as coffee cups, filters, and various cleaning materials for use at his place of business. Taxpayer rents uniforms and towels from a laundry service for use on the premises. The Department audited taxpayer for tax years 1997 through 1999.

Because of taxpayer's inadequate recordkeeping practices, it was impossible for the Department to determine whether the tire sales and repairs qualified for the "exempt farm use" sales tax exemption provided by IC 6-2.5-5-2. Audit, therefore, proposed additional assessments of sales tax on taxpayer's tire sales and repairs. Taxpayer failed to collect and remit sales tax on the various sundries taxpayer offered for sale in addition to tires. Taxpayer failed to pay gross retail tax at the time of purchase of supplies for making coffee on the premises and for cleaning supplies and failed to self-assess remit use tax on these purchases. Taxpayer also failed to self-assess and remit use tax on the uniform and towel rental transactions. The Department imposed use tax on the coffee supplies and cleaning materials purchases and on the rental transactions. In addition, the Department imposed a 10% negligence penalty. Taxpayer timely protested the assessed taxes and penalty. Further information will be provided as necessary.

**I. Sales Tax – Imposition of Sales Tax on Exempt Items**

**DISCUSSION**

The taxpayer protests the imposition of sales tax on tires sold to farmers. Indiana Code section 6-2.5-2-1(a) establishes "[a]n excise tax, known as the state gross retail tax," to be "imposed on retail transactions made in Indiana." Moreover, IC 6-8.1-5-4 mandates that "[e]very person subject to a listed tax must keep books and records so that the department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records." Records with the proper exemption information were not available for the tax years within the audit period.

Under IC 6-2.5-2-1(b), “[t]he person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. **The retail merchant shall collect the tax as agent for the state.**” Pursuant to 45 IAC 2.2-2-2, “[t]he retail merchant, acting as an agent for the state of Indiana, must collect the tax. The tax is bourne [sic] by the customer. Consideration is a necessary element of the taxable transaction.” Pursuant to these code sections and regulations, taxpayer should have collected and remitted gross retail tax on the sales of tires except for those exempt transactions allowed under IC 6-2.5-5-2.

Indiana Code section 6-2.5-8-8 provides in pertinent part:

(a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

During the audit, there was no way for the Department to distinguish between exempt and non-exempt cash sales. Therefore, sales tax was assessed on all cash tire sales during the audit period.

IC 6-8.1-3-1(a) states that the Department “has the primary responsibility for the administration, collection, and enforcement of the listed taxes.” Under IC 6-8.1-1-1, the state gross retail and use taxes are “listed taxes.” Taxpayer’s duty to maintain proper records (IC 6-8.1-5-4) is two-fold: 1.) the collection and maintenance of exemption certificates enables taxpayer to prove that sales to certain customers are exempt from the imposition of sales and use taxes and 2.) the collection and maintenance of exemption certificates facilitates the Department’s enforcement and collection of sales and use taxes which taxpayer, as a retail merchant, must collect and remit to the Department.

In this case, taxpayer’s failure to collect and maintain exemption certificates has deprived taxpayer of the evidence needed to prove certain sales were exempt and deprived the Department of its ability to determine the correct amount of taxpayer’s liability for the listed taxes, i.e., sales and use taxes. Therefore, the Department correctly assessed sales tax on all cash tire sales for the audit period.

### **FINDING**

The taxpayer’s protest is denied.

## **II. Sales Tax – Imposition of Sales Tax on Sundries**

### **DISCUSSION**

Taxpayer protests the imposition of sales tax on various sundries—soda, cigarettes, magazines, and bagged snack items—he sells to the public in addition to selling and repairing tires. Some of the items are sold at cost; some are sold at a 10% mark-up. Taxpayer did not collect and remit gross retail tax for these transactions.

Pursuant to IC 6-2.5-2-1(a), sales tax is “imposed on retail transactions made in Indiana.” Taxable transactions occurred with each purchase of soda, cigarettes, magazines, and/or bagged snack item. Purchasers should have been charged the gross retail sales tax and taxpayer should have collected and remitted those amounts “as agent for the state” of Indiana.

### **FINDING**

The taxpayer’s protest is denied

### **III. Use Tax – Imposition of Use Tax on Coffee Supplies, Cleaning Materials, and Rental Items**

Taxpayer protests the imposition of use tax on its purchases of coffee supplies, cleaning materials, and on the rental of uniforms and towels from a laundry service. No state gross retail tax was paid at the time of the purchases and rentals. Under IC 6-2.5-3-1 and 6-2.5-3-2, taxpayer must collect and remit use tax “on the storage, use, or consumption of tangible personal property.” Section 6-2.5-3-2(a) provides in part:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Coffee filters, styrofoam cups, cleaning materials, uniforms, and towels are all tangible personal property. The coffee supplies are for consumption on the premises. The cleaning supplies are for use on the premises. No state gross retail tax was collected and remitted for these items at the time of purchase. Therefore, under IC 6-2.5-3-2(a), taxpayer should have self-assessed and remitted use tax on these items.

Taxpayer rents the uniforms and towels from a vendor for use in the tire sales part of the business. 45 IAC 2.2-4-27 provides that “the gross receipts from renting or leasing tangible personal property are taxable. This regulation only exempts from tax those transactions which would have been exempt in an equivalent sales transaction.” And in this instance, selling uniforms and towels would not have been exempt from sales tax. Subsection (c) states that “[t]he rental or leasing of tangible personal property constitutes a retail transaction, and [t]he lessor must collect and remit the gross retail tax on the amount of actual receipts as agent for the state of Indiana.” Therefore, under 45 IAC 2.2-3-19 and 45 IAC 2.2-4-27, taxpayer should have self-assessed and remitted use tax on the rental of uniforms and towels.

### **FINDING**

The taxpayer's protest is denied.

#### **IV. Tax Administration -- Penalty**

Taxpayer protests the Department's imposition of the 10% negligence penalty, arguing that he has followed the same system of recordkeeping for three generations, and such methodology does not rise to the level of negligence defined in 45 IAC 15-11-2(b).

Indiana Code 6-8.1-10-2.1(a)(3) authorizes the Department to impose a penalty on a taxpayer if he "incurs, upon examination by the department, a deficiency that is due to negligence." Indiana Administrative Code, Title 45, Article 15, Rule 11-2(b) provides in pertinent part:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

In determining whether or not to assess the 10% penalty, the Department looks for indicia of negligence as well as indicia of due diligence. Under IC 6-8.1-5-4, the taxpayer has an affirmative duty to maintain "books and records so that the department can determine the amount, if any, of the person's liability by reviewing those books and records." Since taxpayer did not use reasonable care or due diligence in maintaining the proper records for sales and use tax, negligence has occurred under 45 IAC 15-11-2(b).

### **FINDING**

The taxpayer's protest is denied.